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No. 07-792

FILED

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In The
Supreme Court of the United States

JOHN CRANE INC.,

Petitioner,

v.

WANDA T. JONES,
ADMINISTRATRIX OF THE ESTATE OF
GARLAND F. JONES, JR., DECEASED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

REPLY BRIEF OF PETITIONER

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INTRODUCTION

John Crane hereby responds to the new matters in Respondent's Brief in Opposition pursuant to Rule 16.6 of the Rules of the Supreme Court of the United States. First, contrary to Respondent's claim, John Crane does not advocate any alteration of the Sisson or Grubart tests, but rather argues that those cases should be applied properly to this matter. (See Brief in Opposition, 33). In fact, Respondent conspicuously fails to respond to John Crane's reasoned arguments that there is no justification for the application of a uniform maritime standard or a need for a court with expertise in admiralty to decide garden variety tort cases such as the one at bar. This can only be considered a tacit acknowledgement by Respondent that the "primary focus" of maritime law -- to protect maritime commerce[1] -- is not promoted by expanding its jurisdiction to shipyard asbestos cases, as John Crane argues more fully below.

Second, the application of maritime jurisdiction to shipyard asbestos claims would have a dramatic effect on how such cases are litigated in many jurisdictions. Third, the principles announced by this Court in Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995) (hereinafter Grubart) and its predecessors, Sisson v. Ruby, 497 U.S. 358 (1990), Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982), and Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), are clear and should not be changed in

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[1] Foremost, 457 U.S. at 674.

products liability cases, as Respondent seems to advocate. Finally, the Supreme Court of Virginia placed far too much emphasis on the particular facts of this case, instead of evaluating the general character of the activity giving rise to the injury, as required by Grubart. To the extent Respondent advocates that the Supreme Court of Virginia's misguided analysis was an appropriate application of this Court's established principles of maritime jurisdiction, she is mistaken.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

I. John Crane Does Not Advocate Any Modification to this Court's Well-Established Jurisdictional Analysis.

Contrary to Respondent's implication, John Crane does not suggest that this Court abandon or modify its clear precedent established in Sisson and Grubart. To cite just one example of Respondent's mischaracterization of John Crane's arguments, John Crane does not believe that "the plaintiff's or defendant's role must be 'unique to maritime service.'" (See Brief in Opposition, 33). John Crane merely asks this Court to rule consistently with its opinions in Grubart and its predecessors. Respondent cannot show that the tortfeasor's activity was sufficiently related to traditional maritime activity such that the reasons for applying admiralty's special rules would apply here. See Grubart, 513 U.S. at 539.

Indeed, Respondent does not even attempt to argue that this garden-variety product liability case would benefit from the application of special admiralty rules—rules devised to protect maritime commerce through regulation of the peculiar activity of vessels on navigable waters. Nor is it ever made clear why uniformity of decision would be desirable in asbestos product liability cases where the plaintiffs simply inhaled fibers while working on navigable waters. By failing to address either of these concerns, Respondent passively acknowledges the weakness of her position.

Maritime jurisdiction can only be appropriate where the justification for special rules is apparent. Evaluation of the manufacture and sale of asbestos products does not require any special expertise on the fact-finder's part, and it does not demand the exercise of uniform common-law rules designed to apply to vessels on navigable waters. Along with the hundreds of thousands of other asbestos tort claims, this case should be decided consistently with well-established state tort law. See Grubart, 513 U.S. at 543 (acknowledging that "States have a strong interest in applying their own tort law").

Finally, a ruling in John Crane's favor would not "flatly eliminate maritime jurisdiction over all vessel-related torts if the product was manufactured in a land-based factory". (Brief in Opposition, 33). This argument begs the question because it assumes that John Crane's activity was vessel related. Peering through the lens of the Grubart generality principle (see § IV, infra) reveals that John Crane's activity is not "vessel-related," so a decision in John

Crane's favor would return maritime law to its well-charted course.

II. The Disposition of this Appeal Has the Potential to Affect a Multitude of Cases in Lower Courts.

The concerns raised in this appeal are not trivial. This Court's decision herein will affect many cases across the country, despite Respondent's implication to the contrary.[2] (Brief in Opposition, 4-7). Mr. Jones' exposure history is hardly unique. Indeed, Respondent's counsel in this case is currently pursuing dozens of active shipyard asbestos cases against John Crane alone. One other such case, John Crane Inc. v. Oney, Supreme Court of Virginia No. 071861, has a very similar fact pattern to that in Jones and will be appealed to this Court on the same issue in the coming weeks.

The differences between maritime and Virginia tort law number far more than those described in John Crane's Petition; some were excluded for the sake of brevity, others because they were not important to this particular case. To cite a few more differences, maritime law follows a comparative fault approach to liability with allocation of fault among joint wrongdoers, McDermott, Inc. v. AmClyde, 511 U.S. 202, 207

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[2] This belief is particularly incongruous with Respondent's argument that a decision in John Crane's favor would "eviscerate maritime product liability actions". (Brief in Opposition, 30; see also § I, supra). Thus, by any reasonable standards, the implications of this case are sufficiently weighty to demand close scrutiny.

(1994), while contributory negligence by the plaintiff is a complete bar to recovery in Virginia. Estate of Moses v. Southwestern Va. Transit Mngmnt. Co., 273 Va. 672, 678, 643 S.E.2d 156, 159-60 (2007). Plaintiffs in admiralty courts can recover under a strict liability standard, East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 865 (1986); plaintiffs in Virginia courts cannot. Sensenbrenner v. Rust, Orling & Neale, Architects, 236 Va. 419, 424 n.4, 374 S.E.2d 55, 57 (1988). Virginia observes a statutory cap of $350,000 on punitive damages. § 8.01-38.1, Code of Virginia, 1950, as amended. General maritime law, if it provides for punitive damages, has no cap.

Any state whose laws differ from maritime rules in any one of the foregoing respects will be affected by the outcome of this appeal. Shipyard asbestos litigation is extremely active in a multitude of American jurisdictions. Accordingly, this case presents this Court with an opportunity to establish a far-reaching and highly relevant precedent in the application of maritime jurisdiction.

III. The Nexus Test is a Crucial Part of the Maritime Jurisdictional Analysis and There is No Support for the Marginalization that Respondent Apparently Advocates.

Though she admits that "the universe of multifactor results may fit as a subset within the universe of the Sisson test's results" (Brief in Opposition, 8), Respondent attempts to marginalize any case turning on Sisson's nexus test as an

obscure "fringe case" and essentially urges this Court to ignore the test in product liability cases. (Brief in Opposition, 20). These arguments, and the Virginia Supreme Court's ruling, are untenable upon a close reading of Grubart and Sisson.

The requirements of the second nexus prong are not on the "fringe". They are not a mere exception but comprise an important piece of the jurisdictional puzzle. That the activity giving rise to the incident causing injury be substantially related to traditional maritime activity is closely tied to the unquestionable focus of admiralty jurisdiction: the protection of maritime commerce. See Foremost, 457 U.S. at 674-75. As John Crane argued in its Petition, this purpose is only satisfied when maritime law is applied to wrongdoers participating in traditional maritime activity. Thus an operator of a pleasure boat is subject to maritime law because he operated a vessel on navigable waters. Foremost, 457 U.S. at 669. A tortfeasor enjoys the protections of maritime limitation of liability because he stored

and maintained a vessel on navigable waters.[3] Sisson, 497 U.S. at 365. A crane operator is subject to maritime law because it was engaged in "repair or maintenance work on a navigable waterway performed from a vessel." Grubart, 513 U.S. at 540 (emphasis added). John Crane's activity, on the other hand, was not vessel-related or on navigable waters. Placing asbestos products into the stream of commerce does not necessarily implicate a vessel on navigable waters, and asbestos fibers have been used in myriad applications unrelated to maritime activity.

Respondent's distaste for the nexus test is apparent in her mistaken belief that Grubart and Sisson declined to adopt a multifactor "substantial relationship" test because this Court found such tests too restrictive. (Brief in Opposition, 12). Nothing in either decision suggests that this Court disapproved the multifactor tests because the results

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[3] Respondent's suggestion that the maintenance of a washer/dryer unit created maritime jurisdiction in Sisson reveals her fundamental misunderstanding of the importance of generality to this inquiry. (Brief in Opposition, 33). In Sisson, this Court held that the relevant activity was "the storage and maintenance of a vessel at a marina on navigable waters." Sisson, 497 U.S. at 365. Respondent's ultra-specific focus on the storage and maintenance of the washer/dryer is not only inconsistent with this Court's plain language; it is exactly the type of "particularized analysis" that she pretends to eschew. (Brief in Opposition, 33). More germane to John Crane's activities as a manufacturer, this Court has since acknowledged that the actions of the washer/dryer manufacturer in Sisson were "hardly maritime," strongly implying that the manufacturer would not have been subject to maritime law if it were hailed into court alone. Grubart, 513 U.S. at 541.

produced by those tests were overly restrictive. On the contrary, "the Sisson tests are aimed at the same objectives invoked to support a new multifactor test, the elimination of admiralty jurisdiction where the rationale for the jurisdiction does not support it." Grubart, 513 U.S. at 544-45. This Court simply found that fine-tuning its rule, as the petitioners in Grubart and Sisson asked it to do, was unnecessary because the Sisson test assumed that satisfaction of its factors implicated a finding of federal interest in the protection of maritime commerce. See id., Sisson, 497 U.S. at 364 n.2. In other words, the concern was not with faulty results, but practicality. The notion that the multifactor tests are somehow inherently "more restrictive" than the Sisson factors seems to have been fabricated from whole cloth.[4]

Furthermore, the "substantial relationship" prong should not be treated as a redundant second "locality" test in products liability cases, as Respondent believes. (Brief in Opposition, 29). Though two members of this Court have advocated the restoration of the strict "locality" test, the

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[4] In Grubart, the petitioners asked this Court to add to the second nexus prong a "totality of the circumstances" test to be applied only in cases "involving land based parties and injuries". Grubart, 513 U.S. at 543. Hence this Court's discussion of "land-based parties". Id. at 545. The multifactor tests were designed only to interpret the second nexus prong. John Crane does not ask this Court to change its rule and does not deny maritime jurisdiction simply because it is "land-based". It denies maritime jurisdiction because the inhalation of asbestos fibers does not threaten maritime commerce and because John Crane's actions bore no relation to traditional maritime concerns.

"substantial relationship" analysis set forth in Sisson and Grubart clearly requires evaluation of the tortfeasor's activity alone, without regard to where the injury took place. It would make little sense to observe a "substantial relationship" prong if it were simply a restatement of the "locality" test. This Court does not ask "where the tort occurred" for the purposes of this prong, but rather looks to the general character of the tortfeasor's activity giving rise to the incident. Grubart, 513 U.S. at 534. None of John Crane's activity which gave rise to Mr. Jones' injury was maritime, regardless of where the injury was incurred.[5] Finally, none of the pre-Executive Jet cases cited by Respondent, decided under the locality rule and before the introduction of the "substantial relationship test," is of any use to this Court.

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[5] Compare John Crane's activity to that of the defendants in Respondent's most favored appellate case, Jig the Third Corp. v. Puritan Marine Ins. Underwriters Corp., 519 F.2d 171 (5th Cir. 1975), where the defendant actually designed and built the entire vessel, not just the defective 4-inch shaft as Respondent implies. In any event, Jig the Third is of no precedential value because it was decided prior to Foremost and Sisson, which were both aimed at keeping certain cases out of admiralty. Grubart, 513 U.S. at 364. Likewise, the defendant in East River, a pre-Sisson case, designed, built, and even supervised the installation of massive turbines for use aboard specific ships. East River, 476 U.S. at 859. Unlike in this case, the defendants' activities in Jig the Third and East River directly involved vessels. Their products could only have been used in a maritime context; they had no other conceivable use.

IV. The Supreme Court of Virginia's "Substantial Relationship" Analysis Was Improperly Focused on Facts Extraneous to the Grubart and Sisson Test.

In its analysis of the "substantial relationship" prong, the Supreme Court of Virginia cited two reasons for its finding that John Crane's activity was substantially related to traditional maritime activities. John Crane Inc. v. Jones, __ Va. __, 650 S.E.2d 851, 854-55 (2007) (hereinafter Jones). The first was a reliance on its previous opinion in Garlock Sealing Technologies, LLC v. Little, 270 Va. 381, 384-86, 620 S.E.2d 773, 775-77 (hereinafter Little). John Crane has already shown how the Little court improperly focused its inquiry on the activity of the plaintiff and defined the relevant activity as "ship repair," rather than examining the activity of the defendant. (Petition, 24 n.9); see also Grubart, 513 U.S. at 539-40 (describing the relevant inquiry as "whether a tortfeasor's activity...on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand") (emphasis added). To be sure, neither Garlock nor John Crane was engaged in "ship repair," and there is no reason to apply special maritime rules to this garden variety product liability tort.

The Supreme Court of Virginia's second consideration in its analysis of the "substantial relationship" prong was an extremely case-specific recitation of facts. Jones, 650 S.E.2d at 855. Even

though it correctly defined the relevant activity in general terms as "the manufacture and sale of asbestos-containing products into the stream of commerce,"[6] the Supreme Court of Virginia went from this general characterization to a highly particularized discussion of the content and location of John Crane's advertisements. Jones, 650 S.E.2d at 854-55. According to the court, John Crane's advertising activity "bore a substantial relationship to traditional maritime activities." Id. at 855. But under Grubart, the general character of John Crane's activity giving rise to the incident should have been tested for a substantial relationship, not the specific features of John Crane's advertisements. Grubart, 513 U.S. at 534, 539-40. As John Crane argued in its Petition, its advertisements were not a proximate cause of Mr. Jones' injury, and it was improper for the court to assume in a jurisdictional analysis that they were. (Petition at 27).

Furthermore, the court failed to show how John Crane's activity justified the application of maritime's special rules. There was no discussion of how generally placing asbestos-containing products in the stream of commerce is activity "on navigable waters" or substantially related to maritime pursuits. See Grubart, 513 U.S. at 539-40. Nor is

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[6] John Crane proposed a slightly different definition of the relevant activity in its Petition: "failure to warn of the use of asbestos fibers in its products that were placed into the stream of commerce". (Petition, 25). Either definition is an acceptable description of the activity giving rise to Mr. Jones' inhalation of asbestos fibers. John Crane disagrees only with the Supreme Court of Virginia's application of that definition, as stated infra.

there any explanation of how placing asbestos-containing products into the stream of commerce is so closely related to admiralty law that the reasons for applying special admiralty rules would apply. Respondent's and the Supreme Court of Virginia's reasoning is in clear conflict with Grubart's emphasis on the general over the specific, and completely ignores the lack of justification for the uniform application of special admiralty rules to the general aspects of John Crane's activity in this case.

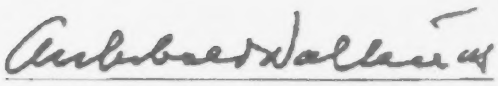
Despite Respondent's efforts to downplay the importance that the Supreme Court of Virginia placed on John Crane's advertising to the maritime industry (Brief in Opposition, 32-33), the court did indeed hold that the advertisements alone satisfied the "substantial relationship" test. Jones, 650 S.E.2d at 855. John Crane did not raise any "limited exception" argument to provoke this overly fact-specific analysis. (See Appellant's Brief to Supreme Court of Virginia, 2a-17a). Respondent's suggestion that the Supreme Court of Virginia would dedicate the entirety of its analysis of an important prong of jurisdictional analysis to "rebut" a theory that was not even submitted to that court is wildly fanciful. Without prompting, the court departed from a proper analysis of the general character of the activity for a narrow analysis of case-specific facts, and used those facts to fashion its decision. In supporting this logic, Respondent further indicates that she does not reject a "particularized analysis," but only professes to do so when it suits her.

CONCLUSION

For the foregoing reasons, and for those stated in its Petition for Writ of Certiorari, John Crane respectfully renews its request that this Court grant its Petition.

JOHN CRANE INC.

By Counsel



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APPENDIX

IN THE

Supreme Court of Virginia

RECORD NO. 062164

JOHN CRANE INC.,

Appellant,

v.

WANDA T. JONES,
ADMINISTRATRIX OF THE ESTATE OF
GARLAND F. JONES, JR., DECEASED

Appellee.

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* * *

IV. THE TRIAL COURT ERRED IN APPLYING GENERAL MARITIME LAW RATHER THAN VIRGINIA LAW.

The trial court committed reversible error in applying federal maritime law. At the February 10, 2006 pretrial conference, John Crane advocated for the application of Virginia law; Plaintiff argued maritime law should apply. (App. pp. 1344-51) The thrust of John Crane's argument was that the trial court must focus on the "activity" or the "wrong" allegedly committed by the tortfeasor in determining whether to apply maritime law, and that John Crane's actions had no connection to maritime activities. (App. pp. 131-38, 1345-46) Plaintiff contended that the trial court's decision hinged on the location of Mr. Jones' harm - the shipyard and the interior of the U.S.S. America. (App. pp. 191-201) The trial court sided with Plaintiff, basing its decision on this Court's decision in Little. (App. p. 1351)

John Crane respectfully requests that this Court re-assess the statements in Little concerning the application of maritime law to cases such as this, because Little misinterpreted the United States Supreme Court's holding in Sisson v. Ruby, 497 U.S. 358, 362 (1990). In Sisson, the Supreme Court held that maritime jurisdiction is dependent upon (1) the incident's potential to disrupt maritime commerce, and (2) the activity from which the incident arose and whether that activity bore a significant relationship to traditional maritime activity. Id. at

365-67. In Little, while examining the "incident's" connection with traditional maritime activity, the Court misidentified the relevant "activity" as "ship repair" — the activity plaintiff was engaged in - rather than focusing on "activity" or conduct of the tortfeasor. Following that rationale, the trial court's application of maritime law to this case was improper because John Crane's "activity" - the manufacture of an allegedly defective product, and the failure to warn users of its dangerous properties - bears no relation to traditional maritime activity. The error was prejudicial, because the jury was instructed on the "knew or should have known" duty of care provided by maritime law instead of the proper "knew or had reason to know" standard in Virginia. This Court reviews questions of law de novo, including those situations where there is a mixed question of law and fact. Westgate at Williamsburg Condo. Ass'n v. Philip Richardson Co., 270 Va. 566, 574, 621 S.E.2d 114, 118 (2005).

A. The Sisson Test Narrowed The Application Of Admiralty Jurisdiction And General Maritime Law To Tort Cases.

In Executive Jet Aviation. Inc. v. City of Ohio.,409 U.S. 249, 93 S. Ct. 493 (1972), the Supreme Court adopted a two-prong test for determining whether admiralty law applied to a plane crash in the waters of Lake Erie: (1) the *situs* of the crash had to be within navigable waters; and (2) there had to be some *nexus* between the type of activity involved and traditional maritime activity. Id. at 253-255. A trilogy of subsequent opinions

expanded upon these requirements: Foremost Ins. Co. v. Richardson, 457 U.S. 668, 102 S. Ct. 2654 (1982); Sisson v. Ruby, 497 U.S. 358, 110 S. Ct. 2892 (1990); and Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 115 S. Ct. 1043 (1995).

After Foremost, Sisson and Grubart, the threshold "locality" prong remained the same, asking "whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water." Grubart, 513 U.S. at 534. However, the "maritime connection" or "nexus" prong was expanded to require a court to determine if (1) the "incident" has "a potentially disruptive impact on maritime commerce," Sisson, 497 U.S. at 363, and (2) whether the "activity" giving rise to the incident had "a substantial relationship to traditional maritime activity." Id. at 364; Grubart, 513 U.S. at 534. This analysis is generally referred to as "the Sisson test." Applying the Sisson test to the facts of this case reveals that there was no maritime connection.

1. The Trial Court Correctly Found The "Locality" Prong of the Sisson Test Satisfied.

The parties agree that Mr. Jones' asbestos injury occurred at the Newport News Shipyard on the James River for purposes of determining the choice of law. The Plymouth, 70 U.S. (3 Wall) 20, 34-35 (1866); East River Steamship Corp. v. TransAmerica, 476 U.S. 858, 863-864 106 S. Ct. 2295, 2299 (1986). The federal courts have found the locality prong satisfied in cases where shipyard

workers were exposed to asbestos fibers while building or repairing vessels partially on land, and partially at sea. See, e.g., Harville v. Johns-Manville Products Corp., 731 F.2d 775, 782 (11th Cir. 1984) (finding the locality test is met when only some of the asbestos exposure occurred in a maritime situs); Owens-Illinois, Inc. v. United States District Court, 698 F.2d 967, 969 (9th Cir. 1983) (locality test met where shipyard worker was exposed to asbestos on land and in the harbor). Mr. Jones was exposed to asbestos fibers while working aboard an incomplete, but launched, vessel. Accordingly, the locality prong was satisfied.

2. The Trial Court Erred In Applying The "Maritime Connection" Prong of the Sisson Test.

The trial court erred, however, in evaluating both subsets of the "maritime connection" or "nexus" test. First, Mr. Jones' inhalation of asbestos aboard a nascent U.S. Navy ship did not have a "potentially disruptive impact on maritime commerce." Sisson, 497 U.S. at 363. Second, even if there was the potential for the disruption of maritime commerce, John Crane's "activity" in manufacturing asbestos-containing products without adequate warnings did not have "a substantial relationship to traditional maritime activity." Id. at 365. To be sure, Mr. Jones' exposure to asbestos as a shipyard worker was insufficient to create a maritime connection. Every federal court of appeals that has considered the issue has agreed, albeit in cases decided prior to Sisson and Grubart. See, e.g., Eagle-Picher Indus. v. United

States, 846 F.2d 888, 896 (3d Cir.), cert. denied, 488 U.S. 965 (1988); Lopez v. A.C. & S., Inc., 858 F.2d 712 (Fed. Cir. 1988); Oman v. Johns-Manville Corp., 764 F.2d 224 (4th Cir.) (en banc), cert. denied, 474 U.S. 970 (1985); Woessner v. Johns-Manville Sales Corp., 757 F.2d 634, 644 (5th Cir. 1985); Austin v. Unarco Indus., 705 F.2d 1, (1st Cir.), cert. dismissed, 463 U.S. 1247 (1983); Harville, 731 F.2d 775 (11th Cir. 1984); Myhran v. Johns-Manville Corp., 741 F.2d 1119 (9th Cir. 1984); Keene Corp. v. United States, 700 F.2d 836, 844 (2d Cir.), cert. denied, 464 U.S. 864(1983).[8]

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[8] All of these cases were decided prior to Sisson and Grubart. Therefore, they do not frame the issues in terms of "incidents" or "activities," but rather they employ various earlier tests for evaluating whether the plaintiffs claim should be decided under maritime law. The majority of them followed either a four-part test created by the Ninth Circuit, or the four-part "Kelly Test" first annunciated by the Fifth Circuit in Kelly v. Smith, 485 F.2d 520, 525 (5th Cir. 1973) (the court must consider (1) the function and roles of the parties, (2) the types of vehicles and instrumentalities involved, (3) the causation and type of injury, and (4) traditional concepts of the role of admiralty law). Although adoption of the Kelly test was considered, but rejected, by the Supreme Court in Grubart, John Crane submits the outcome in these cases — that the shipyard workers' claims had no connection to traditional maritime activities - would be the same under Grubart. Significantly, the Supreme Court has not overruled these decisions, and they are still the law in their respective jurisdictions. Moreover, this Court has not commented on them.

a. The "Incident" Of Inhaling Asbestos Fibers Aboard An Unfinished Vessel Had No Potential To Disrupt Maritime Commerce.

Under the nexus test, the Court must first "'assess the general features of the type of incident involved' to determine whether the incident has a 'potentially disruptive impact on maritime commerce.'" Grubart, 513 U.S. at 534, citing Sisson, 497 U.S. at 363-365. In describing, or assessing, the "incident" involved, a court must use an "intermediate level of possible generality," and the incident may not be described too generally or too narrowly. Id. at 538-539. In other words, the court must determine "whether the incident could be seen within a class of incidents that posed more than a fanciful risk to commercial shipping." Id. at 539, because the "primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce; Foremost, 457 U.S. at 674.

In this case, the "incident" giving rise to Plaintiffs injury should have been described in general terms as "the inhalation of asbestos fibers while installing asbestos-containing products within a U.S. Navy ship." John Crane argued to the lower court that, in a new construction setting, inhalation of asbestos has nothing more than a fanciful potential to disrupt maritime commerce. (App. pp. 132-33) See, e.g., Owens-Illinois, Inc., 698 F.2d at 970 (holding that new ship construction does not have the "maritime flavor" necessary to invoke

admiralty jurisdiction). John Crane explained that a shipyard worker's exposure to asbestos does not inevitably lead to health problems, and that the exposures here, as in most cases, occurred without any consequence to maritime commerce at the time of the incident. (App. pp. 7, 132-33) Without immediate harm, or at least a contemporaneous awareness of the deleterious nature of the exposure itself, the incident of inhaling asbestos fibers aboard an unfinished U.S. Navy ship simply does not pose a threat to traditional maritime activities. Accordingly, the first prong of the nexus test was not satisfied, and the trial court erred in finding otherwise.

b. John Crane's "Activity" Giving Rise To The Incident Did Not Have A "Substantial Relationship To Traditional Maritime Activity."

In determining the second part of the nexus test, the Court must decide whether the defendant's "activity" that caused the plaintiffs injury bore a "substantial relationship to traditional maritime activity." Grubart, 513 U.S. at 539 (holding that a tortfeasor's activity, commercial or noncommercial, on navigable waters must be "so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand"). Defining the "activity" in a nexus analysis is separate from defining the "incident" that it caused. Grubart, 513 U.S. at 540. The "incident" is often defined by the

plaintiffs actions, or, more typically, the nature of the accident that lead to the injury. Sisson, 497 U.S. at 363 (defining the "incident" as a fire on a vessel docked at a marina on navigable waters). In contrast, the Grubart Court held that the "actions" giving rise to the incident are defined by the tortfeasor's activities that proximately caused the incident Id. at 541. These distinct, defined terms are often confused and conflated, making the jurisdictional analysis a difficult endeavor for many courts. See, Grubart, 513 U.S. at 549 (Justice Thomas and Justice Scalia concurring, but noting the substantial ambiguity and difficulties created by the Sisson two-part nexus test).

When the relationship between the tortfeasor's activity and traditional maritime concerns is too attenuated, as it was here, admiralty jurisdiction is unavailable. Grubart, 513 U.S. at 540. Contrary to Plaintiffs arguments in the lower court, this has been the analysis in the Supreme Court for decades.

For example, in Foremost, the Court focused on the activity of the tortfeasor to find that admiralty jurisdiction existed. 457 U.S. at 674-677. There, two pleasure boats collided on a navigable waterway. Id. at 669. Although both parties happened to have engaged in the same activity, it was the defendant's conduct - "the negligent operation of a vessel on navigable waters" - that the Court deemed relevant for purposes of concluding

that a sufficient connection with traditional maritime activity existed. Id. at 674-675.

Similarly, in Sisson, the Supreme Court focused on the nature of the tortfeasor's activity to conclude that the suit was substantially related to traditional maritime activity. 497 U.S. at 364-367. There, a fire erupted in the washer/dryer unit of defendant Sisson's vessel, which eventually destroyed that and several other neighboring vessels docked in the same marina. Id. at 360. After finding that the general features of the "incident" involved - a fire at a marina - had the potential to disrupt maritime activity, the Court went on to examine the second part of the nexus test. Id. at 362-364. The Court characterized the relevant "activity" as the defendant's Sisson's, "storage and maintenance of a vessel at a marina on navigable waters." Id. at 365. Importantly, in Sisson, it was the vessel owner and not the manufacturer of the washer/dryer unit that was the named defendant The washer/dryer manufacturer's activity was not addressed inthe Court's ruling.

In Grubart v. Great Lakes Dredge & Dock Co., the Supreme Court clarified its earlier holding in Sisson, and confirmed that it is the tortfeasor's activity that is the primary focus in determining whether admiralty jurisdiction lies. 513 U.S. at 541. There, Great Lakes drove pilings from its barge into the Chicago riverbed, thereby weakening the tunnel structure which the City of Chicago had not properly maintained, and causing the Chicago River to flood into tunnels and basements in downtown Chicago. Id. at 530. Thus, there were two tortfeasors at issue.

Concluding that the substantial relationship test was satisfied, the Court expressly rejected the City's argument that Sisson required the Court to consider the City's own inaction, which, because of its failure to resemble any traditional maritime activity, would take the suit out of admiralty. Id. at 540-541. In rejecting the argument, the Court reasoned that: "The city misread Sisson, however, which did not consider the activities of the washer/dryer manufacturer, who was possibly an additional tortfeasor, and whose activities were hardly maritime." Id. at 541 (emphasis added). Rather, the Grubart Court explained that it was the activities of defendant Sisson, the boat owner, that "supplied the necessary substantial relationship to traditional maritime activity" in that case, and only one tortfeasor need be connected to maritime activity. Id. Importantly, neither the washer/dryer manufacturer, nor the plaintiffs provided such relationship. Grubart, 513 U.S. at 540-541.

As in Sisson, Foremost, and Grubart, the trial court should have focused on the acts of the alleged tortfeasor, John Crane, and not those of Plaintiff in its evaluation. The wrongful activity of John Crane, and thus the relevant "activity" for purposes of the "substantial relationship" test, was the manufacture and placement of asbestos-containing gasket products into the stream of commerce, and the failure to warn of their dangers. Indeed, Plaintiff alleged that the proximate cause of Mr. Jones' death was his inhalation of asbestos dust and fibers from products manufactured by John Crane. (App. pp. 4, 6-7) Plaintiff also alleged that the products manufactured by John Crane, were inherently

dangerous and that it failed to warn Plaintiff of the danger. (App. pp. 12-13) However, these wrongs/activities had no significant connection with traditional maritime activity. Foremost, 457 U.S. at 674; Eagle-Picher Industries, Inc., 846 F.2d at 897 (observing that activities related to navigation, seaworthiness, cargo damage and maintenance and cure are traditional maritime activities).

John Crane is most closely situated to the washer/dryer manufacturer in Sisson, which the Supreme Court reasoned in Grubart undertook "activities" with absolutely no connection to traditional maritime activity. Grubart, 513 U.S. at 540-541. Therefore, just as if the plaintiffs in Sisson had brought suit solely against the washer/dryer manufacturer, or if plaintiffs in Grubart had brought suit solely against the City of Chicago, maritime law should not have been applied.

B. The Trial Court Erred In Relying Upon Garlock Sealing Technologies, LLC v. Little To Apply Maritime Law.

The trial court relied on Garlock Sealing Technologies, LLC v. Little in holding that maritime law was proper in this asbestos exposure case. (App. p. 1351) John Crane respectfully submits that this Court should reconsider its statements in Little concerning the application of maritime law to cases such as this, involving the building of a vessels.

Plaintiff has previously criticized John Crane for asking the Court to disregard stare decisis,

however, there are circumstances in which it is appropriate to reevaluate a prior decisions' rule. In Virginia, when a court of last resort has established a precedent, after full deliberation upon the issue by the court, the precedent will not be treated lightly or ignored, in the absence of flagrant error or mistake. Pulliam v. Coastal Emer. Servs., Inc., 257 Va. 1, 10, 509 S.E.2d 307, 312 (1999)). John Crane submits that, under this standard, stare decisis should not deter this Court from reversing the trial court.

In Little, the decedent had been a submarine repairman whose work included installing and replacing gaskets on submarines. His estate brought a wrongful death action against the manufacturers of the material used to create the gaskets, claiming the gasket material caused decedent's mesothelioma. Plaintiff argued that maritime law applied. Id. at 384. Defendant, Garlock, asserted in response that there was "no relationship between the alleged tort of negligent failure to warn and/or breach of warranty by an asbestos product manufacturer and traditional maritime activity." Id. at 386. The trial court agreed with the plaintiff and applied maritime law.

On appeal, this Court affirmed. Id. Citing Sisson for the proposition that "the relevant activity is determined by the general conduct from which the incident arose," the Court labeled "ship repair" - and more specifically the "installation and maintenance of... gaskets" - as the relevant "activity." Id. For the reasons already explained, John Crane respectfully submits that the Court's reasoning was incorrect, because it is the tortfeasor's, or "wrongdoer's"

activity, and not the activities of the plaintiff, that are material to the analysis. The Little opinion did not engage in a detailed analysis of the law and facts relevant to the Court's "nexus" determination. Little, 270 Va. at 386. Rather, the Court offered the statement that "[t]he installation and maintenance of these gaskets was necessary to enable the submarines to operate properly." Id. This statement reveals that the Court was focused on the "activities" of the plaintiff and the "incident" of installing the gaskets, instead of the "activity" of the tortfeasor, Garlock, that proximately caused the decedent's illness and death. That focus is where the error lies.

Essential to the Court's reasoning in Little was its finding that the United States Supreme Court has "uniformly and consistently held that ship repair is a maritime activity." Little, 270 Va. at 386, citing Robins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449, 457, 45 S.Ct. 157, 158 (1925) and Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U.S. 479, 480-81 43 S.Ct. 418, 418 (1923). John Crane concedes that ship repair, as distinguished from ship construction, is usually deemed a maritime activity. See, e.g., North Pacific Steamship Co. v. Hall Brothers Marine Railway & Shipbuilding Co., 249 U.S. 119, 127, 39 S. Ct. 221, 223 (1919) (repair of vessel is a maritime activity); but see, e.g., The Francis McDonald, 254 U.S. 242, 244-45, 41 S. Ct. 65, 66 (1920) (admiralty jurisdiction does not lie in cases where one furnished labor and materials to a launched, but incomplete, vessel). However, this Court in Little failed to recognize that whether "ship repair" is a maritime activity is not dispositive of the issue. Rather, the relevant activity to assess is that

of the tortfeasor, and Garlock was not in the business of ship repair.

This Court in Little also supported its holding by citation to Mizenko v. Electric Motor and Contracting Co., Inc., 244 Va. 152 (1992). But that case is distinguishable and actually supports the opposite result from that reached in Little. The plaintiff in Mizenko had been working for Metro, a shipyard. The defendant, Electric, was a subcontractor whose employees were working alongside plaintiff, injuring him. The Mizenko Court applied the second prong of the Sisson test to the shipyard, Metro, which had directed plaintiffs actions. The court did not have to distinguish between plaintiff, Metro, and Electric's actions because they were all engaged in the same activity – ship repair. In other words, the tortfeasor's activity was ship repair. Unlike Little, Mizenko was ultimately decided correctly.

Moreover, Little conflicts with at least one of this Court's prior decisions on the applicability of admiralty law. When the Court decided Matthews v. Commonwealth. 253 Va. 180, 482 S.E.2d 810 (1997), it followed Grubart and identified the relevant inquiry as "whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law ..." 253 Va. at 183, 482 S.E.2d at 812 (quoting Grubart at 539-40). In Matthews, the ferry passenger-plaintiff slipped on a lubricant while walking across the ship's deck. The evidence revealed that the lubricant used on the safety gates had collected in puddles on the deck, causing the

hazard that injured the passenger. In applying the nexus test, this Court did not define the relevant "activity" as plaintiffs walking on a ship's deck. Instead, it defined the relevant "activity" as the maintenance of the vessel's deck and safety gates, because that was the "activity" that the *tortfeasor* negligently performed. Thus, this Court in Matthews asked the correct question - what activity proximately caused plaintiffs injury- in reversing the trial court. Matthews is further evidence that the Little decision was flawed, and that the trial court in the instant case similarly incorrectly chose maritime law.

This case is unique to neither maritime service, nor traditional maritime activity. John Crane is a nationwide manufacturer of heat resistant packing and gasket products, some of which contained asbestos. John Crane's activity in manufacturing asbestos products had no significant connection with traditional maritime activity in and of itself, nor did it pose any feasible threat to maritime commerce in the 1960's. The relevant "activity" of the tortfeasor in this case was insufficient to satisfy the nexus test. The Little decision led the trial court to erroneously apply the maritime standard of care where Virginia's law should have been followed. This constituted reversible error, and a new trial under Virginia law should be ordered.

CONCLUSION

For the foregoing reasons, John Crane Inc. respectfully requests that this Court vacate the

judgment of the trial court entered on July 26, 2006, and amended on August 14, 2006, order that a new trial be conducted consistent with the arguments presented herein, or, alternatively, that Plaintiff be ordered to release the excess amount of the verdict, or submit to a new trial on damages alone.

JOHN CRANE INC.
By Counsel

/s/

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